Supreme Court of the United States

OCTOBER TERM, 1964

No. 28

UNITED STATES, PETITIONER

vs.

GIACOMO VENTRESCA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6157.

GIACOMO VENTRESCA, DEFENDENT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPELLANT'S APPENDIX

* * * *

[fols. 1-5] * * *

[fol. 6]

* * * *

August 31, 1961

APPLICATION FOR SEARCH WARRANT:

To: Honorable W. Arthur Garrity
United States Commissioner
District of Massachusetts
Worcester, Massachusetts

I, Walter A. Mazaka, Investigator for the Alcohol and Tobacco Tax Division, Internal Revenue Service, United States Treasury Department, on oath complain that I have reasonable cause to believe, and I do believe, that certain material, apparatus, articles, and devices, including a still [fol. 7] used in the manufacture of non-tax-paid liquor, together with a quanity of mash fit for distillation of distilled spirits, together with a quanity of non-tax-paid distilled spirits, are in the possession of one Giacomo Ventresca; that said material, apparatus, articles, and devices, including said still and mash and non-tax-paid liquor are now located on certain premises in the City of Worcester, in the Commonwealth and District of Massachusetts; that the premises on which said material, apparatus, articles, and devices, including said still and mash and non-tax-paid distilled spirits are now located at 148½ Coburn Avenue, Worcester, in a one-family light green wooden frame dwelling house situated at the rear of 148 Coburn Avenue, Worcester, occupied by the said Giacomo Ventresca and his family; that said Giacomo Ventresca has in his possession, in violation of 26 USC 5179(a), a still and distilling apparatus setup which has not been registered as required by 26 USC 5171(a); that he has filed no bond covering said still, in violation of 26 USC 5173; that said still is not on an approved location, in violation of 26 USC 5178; that he is in possession of mash which has been made fit for distillation and for the production of distilled spirits, in violation of 26 USC 5222(a); that he has and possesses said liquor and property with intent to defraud the revenue of the United States, in violation of 26 USC 5602 and 5686.

I hereby request a search warrant for the purpose of searching said house and all approaches and appurtenances thereto in the daytime, for the purpose of seizing said material, appartus, articles, and devices, including said still, mash fit for distillation and distilled non-tax-paid spirits illegally held on the premises.

/s/ WALTER A. MAZAKA
Investigator Alcohol and
Tobacco Tax Division
Internal Revenue Service
U. S. Treasury Department

[fol. 8] Subscribed and sworn to before me and in my presence this 31st day of August, 1961; and it appears to me that there is probable cause to believe that the foregoing is true.

/s/ W. ARTHUR GARRITY
United States Commissioner
District of Massachusetts

Approved:

/s/ WILLIAM J. KOEN
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Commissioner's Docket No. 1

Case No. 186

UNITED STATES OF AMERICA

v

CERTAIN BUILDING, TO WIT, 148½ COBURN AVENUE WORCESTER, MASSACHUSETTS, WITH DISTILLING APPARATUS AND MATERIAL OF A CONTRABAND NATURE

AFFIDAVIT FOR SEARCH WARRANT

BEFORE W. ARTHUR GARRITY, Worcester, Massachusetts. The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as a one-family light green wooden frame dwelling house located at 148½ Coburn Avenue, Worcester, occupied by Giacomo Ventresca and his family, together with all approaches and appurtenances thereto, in the District of Massachusetts, there is now being concealed certain property, namely an unknown quantity of material and certain apparatus, articles and devices, including a still and distilling apparatus setup with all attachments thereto, together with an unknown quantity of mash, an [fol.9] unknown quantity of distilled spirits, and other material used in the manufacture of non-tax-paid liquors; which are being held and possessed, and which have been used and are intended for use, in the distillation, manufacture, possession, and distribution of non-tax-paid liquors, in violation of the provisions of 26 USC 5171(a), 5173, 5178, 5179(a), 5222(a), 5602, and 5686.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

SEE ATTACHED SHEET

/s/ WALTER A. MAZAKA
Investigator, Alcohol and Tobacco Tax Div., Internal Revenue Service

Sworn to before me, and subscribed in my presence, August 31st, 1961

/s/ W. ARTHUR GARRITY
United States Commissioner

Based upon observations made by me, and based upon information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their observations and investigation, this request for the issuance of a search is made.

On or about July 28, 1961, about 6:45 P.M., an observation was made covering a Pontiac automobile owned by one Joseph Garry. Garry and one Joseph Incardone put thirteen bags of sugar into the car. These bags of sugar weighed sixty pounds each. Ten such bags were put into the trunk, and three were placed in the rear seat. Those in the rear seat were marked "Domino". The others appeared to have similar markings. After the sugar was loaded into the car, Garry together with Incardone drove it to the vicinity of 148 Coburn Avenue, Worcester, Massachusetts, where the car was parked. Sometime later, the [fol. 10] car with its contents was driven into the yard to the rear of 148 and between the premises 148 and 148½ Coburn Avenue. After remaining there about twenty-five minutes, the same two men drove in the direction of Boston.

On August 2, 1961 a Pontiac car owned by Garry, and driven by Garry with Incardone as a passenger, was followed from Boston to Worcester. The car appeared heavily laden. The car was again driven into the driveway at

148 and 148½ Coburn Avenue to the rear of the yard and between the above-numbered houses.

On August 7, 1961 at least six sixty-pound bags of Domino Sugar were loaded into the Pontiac owned by Garry. The loading was done by Garry and Incardone. The car traveled from Boston to Worcester, then to Holden, and returned with its contents and entered the driveway at 148 and 148½ Coburn Avenue, where the car was parked at the rear between two houses.

On August 11, 1961 new empty metal or tin cans were transferred from a car owned by Incardone to the Pontiac owned by Garry on Highland Street in Hyde Park. The Pontiac was driven by Garry with Incardone as a passenger to Worcester, and into the yard at 148 and 148½ Coburn Avenue to the rear and between the two numbered premises.

On August 16, 1961 the Pontiac was observed. In the back seat bags of sugar were observed covered with a cloth or tarpaulin. A sixty-pound bag of sugar was on the front seat. Garry was observed after loading the above-described sugar into the car placing a carton with various five-pound bags of sugar on the top of the tarpaulin. The car was then driven by Garry with Incardone as a passenger to Worcester together with its contents into the yard at 148 and 148½ Coburn Avenue to the rear of and between the two houses. About Midnight on the same night, the Pontiac driven by Garry with Incardone as a [fol. 11] passenger was seen pulling up to the premises at 59 Highland Street, Hyde Park, where Garry lives. Garry opened the trunk of his car, and removed ten five-gallon cans therefrom, and placed them on the sidewalk. He then entered the house, and opened a door on the side. Incardone made five trips from the sidewalk to the side of the house carrying two five-gallon cans on each such trip. It appeared that the cans were filled. On each of these trips, Incardone passed the two cans to someone standing in the doorway. Immediately after the fifth such trip, Garry came out of the door and joined Incardone. They walked to the sidewalk, and talked for a few minutes. Incardone then drove away, and Garry went into his home.

On August 18, 1961 Investigators smelled an odor of fermenting mash on two occasions between 4:00 A.M. and 5:00 A.M. The first such odor was detected as they walked along the sidewalk in front of 148 Coburn Avenue, and the second such odor was detected from the side of 148 Coburn Avenue. At or about the same time, the Investigators heard certain metallic noises which cannot be further identified by source or sound.

On August 24, 1961 the Pontiac was observed parked at a bowling alley and coffee shop off Route 9. The back of the car contained what appeared to be boxes covered by a cloth or tarpaulin, but which cannot be more specifically identified. On the front seat of the car was observed a sixty-pound bag of Revere Sugar. Garry and Incardone were observed in the restaurant or coffee shop eating. Later the car was seen driven to the rear of 148 between 148 and 148½ Coburn Avenue, Worcester.

About Midnight the Pontiac was observed pulling up in front of Garry's house at 59 Highland Street, Hyde Park. Garry was driving, and Incardone was a passenger. They both got out of the car. Garry opened the trunk and then entered his house. From the trunk of the car there was [fol. 12] removed eleven five-gallon cans which appeared to be filled. Incardone made six trips to a door on the side of the house. He carried two five-gallon cans on each trip, except the sixth trip. On that trip he carried one can, having passed the others to somebody in the doorway, and on the last trip he entered the house. He remained there at least forty-five minutes, and was not observed to leave.

On August 28, 1961 Garry drove Incardone in his car to Worcester. On Lake Ave. they met Giacomo Ventresca, who lives at 148½ Coburn Avenue, Worcester. Ventresca entered the car driven by Garry. The car was then driven into the yard to the rear of 148 and between 148 and 148½ Coburn Avenue. An observation was made that empty metal cans, five-gallon size, were being taken from the car owned by Garry, and brought into the premises at 148½ Coburn Avenue, which was occupied by Ventresca. Later new cans similar in size, shape and appearance were observed being placed into the trunk of Garry's

car while parked at the rear of 148 and in front of 148½ Coburn Avenue. The manner in which the cans were handled, and the sound which were heard during the handling of these cans, were consistent with that of cans containing liquid.

On August 30, 1961, at about 4:00 A.M., an odor of fermenting mash was detected while Investigators were walking on the sidewalk in front of 148 Coburn Avenue. At the same time, they heard sounds similar to that of a motor or a pump coming from the direction of 148½ Coburn Avenue.

The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation.

/s/ WALTER A. MAZAKA

[fol. 13]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Commissioner's Docket No. 1

Case No. 186

UNITED STATES OF AMERICA

v.

CERTAIN BUILDING, TO WIT, 148½ COBURN AVENUE WORCESTER, MASSACHUSETTS, WITH DISTILLING APPARATUS AND MATERIAL OF A CONTRABAND NATURE

SEARCH WARRANT

To any U. S. Marshal, any of his deputies, or any other authorized person:

Affidavit having been made before me by Walter A. Mazaka, Investigator, Alcohol and Tobacco Tax Division,

Internal Revenue Service, U. S. Treasury Department, that he has reason to believe that on the premises known as a one-family light green wooden frame dwelling house located at 148½ Coburn Avenue, Worcester, occupied by Giacomo Ventresca and his family, together with all approaches and appurtenances thereto, in the District of Massachusetts; there is now being concealed certain property, namely an unknown quantity of material and certain apparatus, articles and devices, including a still and distilling apparatus setup with all attachments thereto, together with an unknown quantity of mash, an unknown quantity of distilled spirits, and other material used in the manufacture of non-tax-paid liquors; which are being held and possessed, and which have been used and are intended for use, in the distillation, manufacture, possession, and distribution of non-tax-paid liquors, in violation of the provisions of 26 USC 5171(a), 5173, 5178, 5179 (a), 5222(a), 5602, and 5686. and as I am satisfied that [fol. 14] there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 31st day of August, 1961.

/s/ W. ARTHUR GARRITY,
U. S. Commissioner.

* * * *

[fols. 15-25] * * *

[fol. 26]

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MOTION OF DEFENDANT GIACOMO VENTRESCA FOR THE RETURN OF SEIZED PROPERTY AND THE SUPPRESSION OF EVIDENCE

Criminal No. 62-257-C

The defendant Giacomo Ventresca, moves this Court to direct that the property listed in the affidavit attached [fol. 27] hereto be returned to him and that said property be suppressed as evidence against him in this proceeding.

Your defendant further says that said property was seized and taken from him during the conduct of an illegal and unlawful search and seizure on September 1, 1961 and asserts as his reasons for so saying the following:

I

Said search and seizure was not based on a search warrant issued upon a *lawful affidavit.*

1. The affidavit upon which the search warrant was issued was insufficient in law to establish "probable cause supported by oath or affirmation" within the meaning of the Fourth Amendment to the United States Constitution and of Rule 41 of the Rules of Criminal Procedure for the United States District Courts.

   (a) The affiant, Mazaka, made oath merely to the effect that he had "reason to believe" and not that he knew or did believe. His affidavit was nothing more than an affidavit based on information and belief, a basis which falls legally short of the requirement of probable cause.

   (b) The aforesaid weakness of the affidavit is not supported by any positive averments of knowledge on the part of the affiant as to any of the

alleged facts set forth in the affidavit. It is not apparent on the face of the affidavit as to which statements of fact, or whether any at all, were based upon personal knowledge of the affiant. On its face, the affidavit could well have been based entirely and completely on hearsay, even as to its most material allegations.

[fol. 28] (c) The sum total of all facts in the affidavit give support to nothing more than a conclusion or suspicion of crime and are not sufficiently indicative of probable cause to warrant an interference of the defendant's constitutional right under the Fourth Amendment to be secure in his person, house, papers, and effects.

—The facts show little more than meetings between the defendant and certain people, a transportation by car and in and out of certain houses of such items as sugar, empty tin cans, cans that "appeared" to be filled, cans that were handled and sounded like they were filled, metallic noises, and an odor of fermenting mash in the vicinity of 148 Coburn Avenue (not the premises searched).

—The affidavit contains nothing by way of actual knowledge as opposed to mere suspicion on the part of the affiant or others to support the basic allegation that the alleged liquid in the cans was liquor, or that "non-tax paid liqours" were being manufactured, possessed and distributed.

2. The affidavit upon which the search warrant was issued failed to "particularly" describe the "things to be seized" within the meaning of said Fourth Amendment and said Rule 41.

(a) It addresses itself to "certain apparatus, articles and devices . . . held and possessed, and which have been used and are intended for use in the distillation . . ." etc. etc.

(b) The fact that other personal property, such as a still, may have been described with particularity does not cure this constitutional defect in the
[fol. 29] affidavit since the items described, whether with or without particularity, were set forth in disjunctive fashion in the body of the affidavit.

II

Said search and seizure was based upon a *search warrant* insufficient on its face.

1. Said warrant did not "particularly" describe the things to be seized within the meaning of said Fourth Amendment nor did it 'identify' the property within the meaning of said Rule 41.

   (a) The warrant, like the affidavit, ordered a search for and seizure of what was merely described as "certain apparatus, articles, and devices".

2. Said warrant, as appears on its face, was apparently amended after it was issued. Such an interference would render it null and void.

   (a) Near the end of the fourth full line of the body of the warrant appears both an erasure and an interlineation marked by initials in the margin which do not appear to be those of the issuing officer.

In further support of this Motion defendant points out that he has been severely prejudiced by actions of the officers executing the search in seizing certain items which were outside the scope of the search warrant since clearly not "used or intended for use" in the commission of crime. Yet in view of the loose description in the warrant of the articles to be seized, the searching officers had little to guide them. These items, as shown on the face of the return of the warrant, were a "telephone directory", a "telephone desk directory", and "miscellaneous papers and cards".

[fol. 30] Defendant therefore alleges that the search was, in its essence, unreasonable and unlawful.

The defendant further says that an affidavit accompanies this Motion.

MAHER, MCCANN & TALCOTT

By /s/ Matthew R. McCann
MATTHEW R. MCCANN
340 Main Street
Worcester, Massachusetts

CAFFREY, D.J.

Oct. 10, 1962

By the Ct: After argument in Open Court.

Motions taken under advisement.

/s/ W. J. LYONS *Dep Clk*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AFFIDAVIT OF DEFENDANT GIACOMO VENTRESCA ON HIS MOTION FOR THE RETURN OF SEIZED PROPERTY AND THE SUPPRESSION OF EVIDENCE

Criminal No. 62-257-C

Giacomo Ventresca, being duly sworn, deposes and says:

1. That he is a defendant in this action.
2. That on September 1, 1961 he resided with his family at 148½ Coburn Avenue, Worcester, Massachusetts.
3. That on that date said premises were searched and certain property was seized by agents of the United States Government.

4. That said search of his premises was based upon an affidavit for a search warrant and upon a search warrant, copies of which are attached hereto as appendices "A" and "B" hereof.
5. That said copy of said search warrant includes a copy of the return of service by the executing officer.

[fol. 31] 6. That in the conduct of said search said agents carried off a telephone book and a telephone desk directory (alphabet punch type) both of which were in the living room of said premises; that they ransacked a leather box of personal papers which was situated on the top of my bureaus in my bedroom, and that from said box they carried off some miscellaneous papers and cards; and that they removed my wallet from my pants pocket which were hanging on a hook in my bedroom closet; that from said wallet they removed and carried away certain papers and notes; and that the search and seizure of these items was without consent.

/s/ GIACOMO VENTRESCA

COMMONWEALTH OF MASSACHUSETTS

Worcester, ss. 1962

Personally appeared before me Giacomo Ventresca and made oath that the statements contained in the foregoing affidavit are true, except as to matters alleged upon information and belief, and as to those matters he believes same to be true.

/s/ MATTHEW R. MCCANN
My commission expires
10/26/68.

[Appendices to this motion are here omitted. The Affidavit for Search Warrant appears at page 8 *supra*. The Search Warrant appears at page 13 *supra*. The Return of Search Warrant appears at page 14 *supra*.]

[Affidavit of Defendant Giacomo Ventresca on his motion for the return of seized property and the suppression of evidence in case #62-290-C is here omitted since identical with companion affidavit in #62-257-C except for the case number, which affidavit is reproduced at page 30 *supra*.]

[fol. 32]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MEMORANDUM AND ORDER—December 31, 1962

Criminal No. 62-257-C

CAFFREY, D.J.

The defendant Garry has filed a motion for the return of seized property and the suppression of evidence and the defendant Ventresca has filed six different motions, all of which will be realt with *seriatim*.

1. Defendant Ventresca's motion to amend his motion to dismiss is allowed.

2. Defendant Ventresca's motion for a bill of particulars is denied.

3. Defendant Ventresca's motion for separate trial is denied.

4. Defendant Ventresca's motion to strike certain words from Count 11 is denied, it having become moot by reason of the dismissal of Count 11 on September 20, 1962.

5. Defendant Ventresca's motion to dismiss the indictment as amended is based on the contention that the indictment violates Rule 8, Federal Rules of Criminal Procedure, in that it joins two or more offenses which are not (a) of the same or similar character, or (b) based on the same act or transaction or on two or more acts or transactions connected together. I believe the various counts of the indictment charge offenses of the same or similar character and may be included in one indictment consistent with Rule 8, Federal Rules of Criminal Procedure. See *Spear* v. *United States*, 216 F.2d 185 (4 Cir.

1954); *Kivette* v. *United States*, 230 F.2d 749 (5 Cir. 1956). See, also, *Orfield*, "Joinder in Federal Criminal Procedure," 26 F.R.D. 23 (1961).

Defendant Ventresca also contends that Count 7 of the indictment is duplicitous. An examination of Count 7 indicates that it adopts almost verbatim the language of Section 5686(b) which, contrary to defendant's contention, is [fol. 33] not a mere penalty provision but, on the contrary, specifically defines a substantive offense as well as the penalty therefor. Defendant Ventresca argues that Count 8 likewise is duplicitous because it alleges violations of two separate sections. A reading of Count 8 makes manifest that it charges only violation of Section 5681 (a). This count is not duplicitous.

Defendant Ventresca's motion to dismiss the indictment is denied.

6. Defendant Ventresca has filed a motion for the return of seized property and the suppression of evidence. The first argument in support of this motion is an attack on the affidavit filed by Agent Mazaka of the Alcohol and Tobacco Tax Division, Internal Revenue Service. I rule that the Agent's affidavit is sufficient, under the test promulgated by the Supreme Court in *Jones* v. *United States*, 362 U.S. 257. See, also, *United States* v. *Spears*, 287 F.2d 7 (6 Cir. 1961); *United States* v. *Joseph*, 278 F.2d 504 (3 Cir. 1960). *Cochran* v. *United States*, 291 F.2d 633 (8 Cir. 1961) is distinguishable in that it involved a situation in which the officers obtaining the search warrant acted solely on the basis of an informant's suspicion.

The defendant next argues that the facts in the affidavit do not constitute probable cause because there was "no sure evidence that liquor was involved . . . The cans could have contained anything." The affidavit describes seven occasions on which Garry's car was seen entering Ventresca's driveway. It recites that on four occasions the car was observed to contain bags of sugar and that on one occasion empty five-gallon metal cans were taken from the car into the house occupied by Ventresca. It recites that the agents twice detected the odor of fermenting mash coming from this house and that on three occasions five-gallon cans, apparently filled and apparently

containing liquid, were transferred from the house to the [fol.34] trunk of Garry's car. The affidavit is not inadequate for failure to recite facts tending to establish probable cause that liquor was involved in the activities of defendants.

The next contention of defendant Ventresca is that the description in the warrant of "apparatus, articles and devices . . . which have been used and are intended for use in the distillation, manufacture, possession, and distribution of non-tax paid liquors" fails to describe the things to be seized with the degree of "particularity" required by the Fourth Amendment. The description meets the test set out in Rule 41(b)(2), Federal Rules of Criminal Procedure, and a similar description has been upheld in *Nuckols* v. *United States*, 99 F.2d 353 (C.A. D.C. 1938), cert. den. 305 U.S. 626. See, also, *Merritt* v. *United States*, 249 F.2d 19, 20 (6 Cir. 1957); *Lowrey* v. *United States*, 161 F.2d 30 (8 Cir. 1947), cert. den. 331 U.S. 849.

Finally, defendant Ventresca urges the return of a telephone book, a desk directory, and various papers taken from a box on his bedroom bureau and from his trousers pocket, on the ground that these items were not designed or intended for use or used as the means of committing a criminal offense, as required by Rule 41, Federal Rules of Criminal Procedure, but, on the contrary were at most merely evidence. Defendant's contention is well taken as to the telephone book, the desk directory and the various papers. The motion to suppress is allowed as to these last three items and is otherwise denied.

7. Defendant Garry has filed a motion for the return of seized property and the suppression of evidence. The first argument in support of this motion is that the affidavit fails to establish probable cause. The affidavit filed herein is adequate for the reasons stated with regard to defendant Ventresca's motion to suppress.

Defendant Garry's second contention is that the warrant is insufficient for lack of particularity. The instant war-[fol. 35] rant is sufficient. See *United States* v. *Joseph*, *supra*; *Harris* v. *United States*, 331 U.S. 145 (1947).

Defendant Garry's final contention is that the agents seized property not described in the search warrant. The articles seized were 5 60-lb. bags of sugar, 10 empty one-gallon jugs, 7 decanters containing various amounts of liquor, one jug "Little Elves orange label" one-third full, one empty bottle "Roma Brand" flavoring cordials, and one sheet of white paper containing the notation: "6 gallons (shop), 12 gallons (A1), 3 gallons (left)." All could be classified as being within the authority of the warrant to seize "unknown quantity of non-tax-paid liquors, together with an unknown quantity of material used in the distribution of non-tax-paid liquors." See *Steele* v. *United States*, 267 U.S. 498 (1925); *Bryant* v. *United States*, 252 F.2d 746 (C.A. 5, 1958).

Defendant Garry's motion to suppress and for return of property is denied.

/s/ ANDREW A. CAFFREY
U. S. D. J.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MEMORANDUM AND ORDER—December 31, 1962

Criminal No. 62-290-C

CAFFREY, D.J.

The defendant Ventresca has filed six motions herein, which will be dealt with *seriatim*.

1. Defendant's motion to amend his motion to dismiss is allowed.
2. Defendant's motion for separate trial is denied.
3. Defendant's motion for a bill of particulars is denied.
4. Defendant's motion to strike certain words as surplasage is denied. See *Schnautz* v. *United States*, 263 F.2d

525 (5 Cir. 1959); *Wong Tai* v. *United States*, 273 U.S. 77.

5. Defendant's motion to suppress evidence is allowed [fol. 36] herein to the same extent that his motion to suppress is allowed in Criminal No. 62-257, and otherwise is denied.

6. Defendant's motion to dismiss the indictment is based on four grounds, the first of which has become moot by the dismissal of Count 11 in Criminal No. 62-257. The second ground is the claim that the indictment does not contain a plain, concise, and definite written statement of the facts constituting the offense charged. The short answer to this is that the indictment closely follows the statutory language and does contain a plain, concise and reasonably definite written statement of the facts constituting the offense charged. The third ground urged by the defendant is that the indictment does not allege the place or jurisdiction where the offenses allegedly contemplated by the conspiracy were to take place. Suffice it to say that the charging part of the indictment charges the defendants with conspiring at Boston and Worcester in the District of Massachusetts, and at other places unknown to the grand jury, and these allegations are sufficient for the validity of the indictment. And, finally, the fourth ground urged by the defendant Ventresca is that the indictment is duplicitous in that it alleges more than one conspiracy. A reading of the indictment indicates that on the contrary the indictment charges one conspiracy to commit various crimes. Such a charge is not void for duplicity. The motion to dismiss the indictment is denied.

Defendant Garry has filed herein a motion for return of seized property and the suppression of evidence which is a carbon copy of the motion he filed in Criminal No. 62-257. For the reasons stated in the memorandum and order filed this date in Criminal No. 62-257, defendant Garry's motion herein is denied.

/s/ ANDREW A. CAFFREY
U. S. D. J.

[fol. 37]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

STENOGRAPHIC TRANSCRIPT OF TESTIMONY

* * * *

[Jury drawn and sworn.]

[Conference at the Bench as follows:

Mr. McCann: At the outset of the trial, I would like to renew, to have it noted on the record that the Court permit the Defendant Ventresca's motion to suppress evidence in Case 62-257-C; his motion to dismiss the indictment in Case 62-257-C, and in Case 62-290-C the Defendant Ventresca moves to dismiss the indictment; the Defendant Ventresca's motion to strike certain words from the indictment as superfluous, and the Defendant Ventresca's motion to suppress evidence for the return of seized property, all of which were made earlier and which were denied following a preliminary hearing in this action and in these actions.

The Court: You are renewing the motions at this time?

Mr. McCann: I would like to renew them, and if I may, have them incorporated in the record of this case for this trial, the actual motions previously filed, and so identified.

The Court: They are in the official file. I suppose they are part of the record. In any event, without further action, they are already in the official [3] court papers. I can make the same ruling and deny it.

* * * *

Mr. McCann: Will the Court note the objection of the Defendant Ventresca to the denial of these motions at this time?

The Court: All right.

* * * *

[fols. 38-43] * * *

[fol. 44]

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DEFENDANT VENTRESCA'S MOTION FOR JUDGMENT OF ACQUITTAL

Criminal Case No. 62-257-C

Now comes the defendant Ventresca and moves that the Court order a verdict of not guilty as to him on the following Counts:

Count 1
Count 2
Count 3
Count 4
Count 5
Count 6
Count 7
Count 8

And the defendant assigns as reasons therefor the following:

A. That the evidence is insufficient to warrant his convictions on said counts.

B. That much of the evidence introduced at the trial consisted of evidence obtained by means of a search seizure at the premises known as 148½ Coburn Avenue, Worcester, which search and seizure the defendant contends was illegal and in violation of the defendant's rights under U. S. Constitution, 4th Amendment and Rule 41 of the Criminal Rules of this Court. As to this ground, defendant renews its written motion earlier filed to suppress said evidence which the
[fol. 45] court denied in part and allowed in part by memorandum and order dated December 31, 1962.

C. That the indictment is defective in those respects earlier set forth in the defendant's written motions to dismiss the indictment and to strike surplusage therefrom, which motions the defendant hereby renews.

D. That the evidence is insufficient to warrant a finding

—that the defendant ever commenced or continued the business of a distiller within the meaning of the Internal Revenue Code (See Count 1, 2)

—that the defendant ever failed to make application to the Secretary of the Treasury or his delegate for the registration of a distilled spirits plant within the meaning of the Internal Revenue Code. (See Count 1).

—that the defendant ever had possession, custody or control of a distilled spirits plant within the meaning of the Internal Revenue Code.

—that the defendant ever failed to register a still or distilling apparatus with the Secretary of the Treasury or his delegate (see Count 4).

—that the defendant ever failed to receive notice of the registration of a distilled spirits plant (See Count 1)

—that the defendant ever failed to file a bond in the form prescribed (See Count 2).

—that the premises at 148½ Coburn Avenue were not bonded (See Count 5).

—that the defendant ever possessed distilled spirits in containers not stamped by stamps evidencing determination of the tax and indi-
[fol. 46] cating compliance with the provisions of the Internal Revenue Code (See Count 6).

—that the defendant ever transported, possessed, bought or sold distilled spirits.

—that the defendant ever had or possessed any liquor (See Count 7).

—that the defendant ever had or possessed any liquor intended for use in violating any provisions of Chapter 51 of sub-title E of Title 26 of the Internal Revenue Code, or regulations issued pursuant thereto. (See Count 7).

—that the defendant ever had or possessed any liquor which had been so used in violation of said Chapter 51 (See Count 7).

—that the defendant ever had a criminal intent to defraud the United States of the tax on spirits distilled by him. (See Count 3).

—that the defendant ever transported distilled spirits, or had any transported, from the Coburn Avenue premises with respect to which the tax had not been paid.

By his attorney,

/s/ MATTHEW R. MCCANN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DEFENDANT VENTRESCA'S MOTION FOR JUDGMENT OF ACQUITTAL

Criminal Case No. 62-290-C

Now comes the defendant, Ventresca, and moves that the Court order a verdict of not guilty as to him on the following grounds:

A. That the evidence is insufficient to warrant his conviction.

B. For the same reasons set forth in paragraph B of companion motion in case #62-257-C.

[fol. 47] C. For the same reasons set forth in paragraph C of companion motion in case #62-257-C.

By his attorneys,

/s/ MATTHEW R. MCCANN

Caffrey, D.J.

Mar. 22, 1963

Filed in Open Court
after argument—
Motion denied.

W. J. Lyons, Dep. Clk.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. CR 62-257-C

UNITED STATES OF AMERICA

v.

GIACOMO VENTRESCA

JUDGMENT—April 15, 1963

On this 15th day of April, 1963 came the attorney for the government and the defendant appeared in person and with counsel

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of failing to register a distilled spirits plant in

violation of 26 U.S.C. 2171(a), failing to file a bond in violation of 26 U.S.C. 5173(a), carrying on the business of a distiller in violation of 26 U.S.C. 5602, having in his possession and custody and under his control a still and distilling apparatus which he had failed to register in violation of 26 U.S.C. 5179(a), possessing and producing mash fit for distillation on premises other than the bonded premises of a distilled spirits plant in violation of 26 [fol. 48] U.S.C. 5222(a)(1), possessing distilled spirits in containers which were not stamped by stamps evidencing determination of the tax and indicating compliance with the provisions of the Internal Revenue Code in violation of 26 U.S.C. 5305(a)(2), possessing liquor and property intended for use in violating the Internal Revenue Code in violation of 26 U.S.C. 5686, and failing to post the sign required by 26 U.S.C. 5180(a) in violation of 26 U.S.C. 5681(a). as charged in eight (8) Cts. of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years on Count 1 thru 6 and for imprisonment for one (1) year on Count 7 and 8, said sentence to be served concurrent with that imposed in Criminal 62-290. Prison sentence to commence April 22, 1963.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ ANDREW A. CAFFREY,
United States District Judge

The Court recommends commitment to:

JOHN A. CANAVAN,
Clerk.

[fol. 49]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CR 62-290-C

UNITED STATES OF AMERICA

v.

GIACOMO VENTRESCA

JUDGMENT—April 15, 1963

On this 15th day of April, 1963 came the attorney for the government and the defendant appeared in person and with counsel

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of conspiracy to carry on the business of a distiller with intent to defraud the United States of the tax on spirits produced by a still in the custody, control and possession of the defendants, which still the defendants had failed to register, had failed to file application to register, for which they had failed to give bond, and which they had failed to post with signs indicating the premises were being used as a distillery, to possess mash fit for distillation, to produce spirits in a building and on premises other than on the bonded premises of a distilled spirits plant authorized by law, and to posses liquor and property intended for use in violation of the Internal Revenue Code, including distilled spirits in containers which were not stamped by stamps evidencing determination of the tax due thereon; in violation of 18 U.S.C. 371, as charged in a one (1) Ct. Indictment and the court having asked the defendant whether he has anything to

[fol. 50] say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year, concurrent with sentence imposed in Criminal 62-257. Defendant fined in the amount of $1,000.00 Prison sentence to commence April 22, 1963.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ ANDREW A. CAFFREY,
United States District Judge

The Court recommends commitment to:

JOHN A. CANAVAN,
Clerk.

* * * *

[fols. 51-118] * * *

[fol. 119]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 6157.

GIACOMO VENTRESCA, DEFENDANT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From the United States District Court for the District of Massachusetts

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Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges.*

Matthew R. McCann, with whom *Maher, McCann & Talcott* was on brief, for appellant.

William J. Koen, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.—November 26, 1963.

HARTIGAN, *Circuit Judge.* The defendant, Giacomo Ventresca, appeals from a judgment of conviction of the United States District Court for the District of Massachusetts for possessing and operating an unlawful still in violation of the Internal Revenue Code and for conspiracy to do so.[1]

[1] The defendant was convicted on an eight count indictment for violation of 26 U.S.C. §§ 5171(a), 5173(a), 5602, 5179(a), 5222(a)(1), 5205(a)(2), 5686, 5681(a) (1958) and on a one count indictment for violation of 18 U.S.C. § 371 (1958).

The defendant was arrested in his home on September 1, 1961 by Investigators attached to the Alcohol and To-
[fol. 120] bacco Tax Division of the Internal Revenue Service who were executing a warrant to search for an illicit still. The Investigators found and seized a still, along with other apparatus used in the distilling process and a large quantity of non-tax paid liquors. Some of the seized objects were introduced in evidence against the defendant at the trial.

Prior to trial the defendant filed a motion for the return of seized property and the suppression of evidence obtained through the execution of the search warrant. After receiving evidence on the motion, the district court ruled that the affidavit was sufficient under the test promulgated by the Supreme Court in *Jones* v. *United States*, 362 U.S. 257 (1960). Further, the court ruled that the facts in the affidavit constituted probable cause and the warrant described the things to be seized with sufficient particularity. Ordered suppressed as evidence, however, were a telephone book, desk directory and various papers taken from a box on Ventresca's bedroom bureau and from his trouser pocket on the ground that they were mere evidence and, therefore, not within the provision of Rule 41(b)(2) of the Fed. R. of Crim. P.

The principal question raised by the defendant is the sufficiency of an affidavit signed by one Walter A. Mazaka, an Investigator attached to the Alcohol and Tobacco Tax Division of the Internal Revenue Service, which affidavit was the sole evidence upon which the search warrant was issued.

The affidavit is set out in the margin.[2] It alleged in sub-
[fol. 121] stance that Mazaka had "reason to believe" that

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[2] "AFFIDAVIT FOR SEARCH WARRANT

"BEFORE W. ARTHUR GARRITY, WORCESTER, MASSACHUSETTS
"The undersigned being duly sworn deposes and says:

"That he has reason to believe that on the premises known as a one-family light green wooden frame dwelling house located at 148½ Coburn Avenue, Worcester, occupied by Giacomo Ventresca and his family, together with all approaches and appurtenances thereto, in the District of Massachusetts, there is now being concealed certain property, namely an unknown quantity of material and certain appa-

ratus, articles and devices, nicluding a still and distilling apparatus setup with all attachments thereto, together with an unknown quantity of mash, an unknown quantity of distilled spirits, and other material used in the manufacture of non-tax-paid liquors, which are being held and possessed, and which have been used and are intended for use, in the distillation, manufacture, possession, and distribution of non-tax-paid liquors, in violation of the provisions of 26 USC 5171(a), 5173, 5178, 5179(a), 5222(a), 5602 and 5686.

"And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

"SEE ATTACHED SHEET

(s) WALTER A. MAZAKA
Investigator, Alcohol and
Tobacco Tax Div.,
Internal Revenue Service

"Sworn to before me, and subscribed in my presence, August 31st, 1961

(s) W. ARTHUR GARRITY
United States Commissioner

"Based upon observations made by me, and based upon information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their observations and investigation, this request for the issuance of a search warrant is made.

"On or about July 28, 1961, about 6:45 P.M., an observation was made covering a Pontiac automobile owned by one Joseph Garry. Garry and one Joseph Incardone put thirteen bags of sugar into the car. These bags of sugar weighed sixty pounds each. Ten such bags were put into the trunk, and three were placed in the rear seat. Those in the rear seat were marked 'Domino'. The others appeared to have similar markings. After the sugar was loaded into the car, Garry together with Incardone drove it to the vicinity of 148 Coburn Avenue, Worcester, Massachusetts, where the car was parked. Sometime later, the car with its contents was driven into the yard to the rear of 148 and between the premises 148 and 148½ Coburn Avenue. After remaining there about twenty-five minutes, the same two men drove in the direction of Boston.

"On August 2, 1961, a Pontiac car owned by Garry, and driven by Garry with Incardone as a passenger, was followed from Boston to Worcester. The car appeared heavily laden. The car was again driven into the driveway at 148 and 148½ Coburn Avenue to the rear of the yard and between the above-numbered houses.

"On August 7, 1961 at least six sixty-pound bags of Domino Sugar were loaded into the Pontiac owned by Garry. The loading

was done by Garry and Incardone. The car traveled from Boston to Worcester, then to Holden, and returned with its contents and entered the driveway at 148 and 148½ Coburn Avenue, where the car was parked at the rear between the two house.

"On August 11, 1961 new empty metal or tin cans were transferred from a car owned by Incardone to the Pontiac owned by Garry on Highland Street in Hyde Park. The Pontiac was driven by Garry with Incardone as a passenger to Worcester, and into the yard at 148 and 148½ Coburn Avenue to the rear and between the two numbered premises.

"On August 16, 1961 the Pontiac was observed. In the back seat bags of sugar were observed covered with a cloth or tarpaulin. A sixty-pound bag of sugar was on the front seat. Garry was observed after loading the above-described sugar into the car placing a carton with various five-pound bags of sugar on the top of the tarpaulin. The car was then driven by Garry with Incardone as a passenger to Worcester together with its contents into the yard at 148 and 148½ Coburn Avenue to the rear of and between the two houses. About Midnight on the same night, the Pontiac driven by Garry with Incardone as a passenger, was seen pulling up to the premises at 59 Highland Street, Hyde Park, where Garry lives. Garry opened the trunk of his car, and removed ten five-gallon cans therefrom, and placed them on the sidewalk. He then entered the house, and opened a door on the side. Incardone made five trips from the sidewalk to the side of the house carrying two five-gallon cans on each such trip. It appeared that the cans were filled. On each of these trips, Incardone passed the two cans to someone standing in the doorway. Immediately after the fifth such trip, Garry came out of the door and joined Incardone. They walked to the sidewalk, and talked for a few moments. Incardone then drove away, and Garry went into his home.

"On August 18, 1961 Investigators smelled an odor of fermenting mash on two occasions between 4:00 A.M. and 5:00 A.M. The first such odor was detected as they walked along the sidewalk in front of 148 Coburn Avenue, and the second such odor was detected from the side of 148 Coburn Avenue. At or about the same time, the Investigators heard certain metallic noises which cannot be further identified by source or sound.

"On August 24, 1961 the Pontiac was observed parked at a bowling alley and coffee shop off Route 9. The back of the car contained what appeared to be boxes covered by a cloth or tarpaulin, but which cannot be more specifically identified. On the front seat of the car was observed a sixty-pound bag of Revere Sugar. Garry and Incardone were observed in the restaurant or coffee shop eating. Later the car was seen driven to the rear of 148 between 148 and 148½ Coburn Avenue, Worcester.

"About Midnight the Pontiac was observed pulling up in front of Garry's house at 59 Highland Street, Hyde Park. Garry was driving, and Incardone was a passenger. They both got out of the car.

an illicit still and other material used in the manufacture of non-tax paid liquors were being concealed on the premises of a dwelling house located at 148½ Coburn Avenue, Worcester. On an attached sheet signed by Mazaka were recited the "facts tending to establish the foregoing ground for issuance of a Search Warrant."

The first paragraph of the attached sheet contained the following:

"Based upon observations made by me, and based upon information received officially from other In-
[fol. 122] vestigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of

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Garry opened the trunk, and then entered his house. From the trunk of the car there was removed eleven five-gallon cans which appeared to be filled. Incardone made six trips to a door on the side of the house. He carried two five-gallon cans on each trip, except the sixth trip. On that trip he carried one can, having passed the others to somebody in the doorway, and on the last trip he entered the house. He remained there at least forty-five minutes, and was not observed to leave.

"On August 28, 1961 Garry drove Incardone in his car to Worcester. On Lake Ave. they met Giacomo Ventersca, who lives at 148½ Coburn Avenue, Worcester. Ventresca entered the car driven by Garry. The car was then driven into the yard to the rear of 148 and between 148 and 148½ Coburn Avenue. An observation was made that emtpy metal cans, five-gallon size, were being taken from the car owned by Garry, and brought into the premises at 148½ Coburn Avenue, which was occupied by Ventresca. Later, new cans similar in size, shape and appearance were observed being placed into the trunk of Garry's car while parked at the rear of 148 and in front of 148½ Coburn Avenue. The manner in which the cans were handled, and the sound which were heard during the handling of these cans, were consistent with that of cans containing liquid.

"On August 30, 1961, at about 4:00 A.M., an odor of fermenting mash was detected while Investigators were walking on the sidewalk in front of 148 Coburn Avenue. At the same time, they heard sounds similar to that of a motor or a pump coming from the direction of 148½ Coburn Avenue.

"The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation.

(s) WALTER A. MAZAKA"

their observations and investigation, this request for the issuance of a search warrant is made."

There followed eleven paragraphs of stated facts, nine of which detailed the activities of two men alleged to have been seen riding around in a 1961 Pontiac automobile and making seven individual deliveries of sugar and five-gallon cans to the dwelling house at 148½ Coburn Avenue, Worcester. Two of the paragraphs recited that on three separate occasions "Investigators" smelled an odor of [fol. 123] fermenting mash in the immediate vicinity of the suspected dwelling.

The final paragraph of the attached sheet comprised this statement:

> "The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation."

The affidavit failed to clearly indicate which of the facts alleged therein were hearsay or which were within the affiant's own knowledge. Although the affiant claims part of the information to be based upon "personal knowledge and information," it is stated that such "personal knowl- [fol. 124] edge and information" was obtained from other Investigators.

The finding of probable cause as the basis for issuance of a search warrant is made by the Commissioner from the facts stated in the affidavit when that is the only evidence presented. *Siden* v. *United States*, 9 F.2d 241 (8th Cir. 1925). Such a duty cannot be delegated to the accuser. *United States* v. *Harnich*, 289 Fed. 256 (D.Conn. 1922). Limited to the four corners of the affidavit, there was no way for the Commissioner to determine how much of the factual recitation was based on hearsay and how much was based on personal knowledge of the affiant. It could well be that none of the essential facts set forth [fol. 125] in the affidavit were actually witnessed or established by the affiant. The Commissioner could only conclude that the entire affidavit was based on hearsay.

That is not to say that an affidavit dependent upon of hearsay could not support issuance of a search warrant. The Supreme Court in *Jones* v. *United States*, *supra* at 269, has succinctly stated the law in this respect:

> "The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another. An affidavit is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented."

In *Jones*, the source of the hearsay, the informant, had direct knowledge himself of the possession of contraband articles by the suspect. He was deemed worthy of credence because he had previously given accurate information, his story was corroborated by other sources of information, and the suspect was known to the police as a narcotics user. The Court said at 271:

> "Thus we may assume that [the affiant] Didone had the day before been told by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. *Had that been all, it might not have been enough;* but Didone swore to a basis for accepting the informant's story." (Emphasis supplied).

The Court then went on to recite the further elements listed above, the sum total of which added up to substantial basis for crediting the hearsay.

Where the hearsay evidence has been personally observed by federal officers and communicated directly to the affiant, courts have found a substantial basis for crediting the hearsay. In *United States* v. *McCormick*, [fol. 126] 309 F.2d 367 (7th Cir. 1962), cert. den., 372 U.S. 911 (1963)—a case the government contends "appears to be on all fours" with the instant case—the affiant had no personal knowledge of the averments in the affidavits, but each factual statement was prefaced by the declaration that the F.B.I. agents from whom the infor-

mation was received were "present" and "observed" each described event as it occurred. In *Giacona v. United States*, 257 F.2d 450 (5th Cir.), cert. den., 358 U.S. 873 (1958), the affiant was without personal knowledge but identified his informant as one W. T. Finley of the Federal Bureau of Narcotics who had personally observed the narcotics hidden under the building to be searched.

But the holdings in the aforementioned cases are inapplicable to the facts of this case. With the exception of two paragraphs in the factual recitation alleging that unidentified "Investigators" smelled the odor of fermenting mash in the vicinity of the suspected dwelling, all we learn from Mazaka's affidavit is that the investigators received their information through "investigation."

Thus, the affidavit leaves as a complete mystery the manner in which the Investors discovered their information. There is no indication whatsoever that any of the evidence gathered through the investigation was based upon the personal knowledge or observation of the Investigators. As a consequence there arises doubt that such information was first-hand to the Investigators. The type of fact-finding activities that can qualify under the term "investigation" are numberless. Investigations can, and frequently do, include the interrogation of witnesses, the receipt of information from informants, the receipt of telephone tips, the checking of files and records, etc. We would have in such a case, not a hearsay affidavit alone, but the distinct possibility of hearsay-upon-hearsay.

Hearsay information received from an informant may be used in an affidavit to secure a search or arrest war- [fol. 127] rant only when the informant is shown to be "trustworthy," *Monnette* v. *United States*, 299 F.2d 847 (5th Cir. 1962), or "reliable," *Draper* v. *United States*, 358 U.S. 307 (1959). In *United States* v. *Pearce*, 275 F.2d 318 (7th Cir. 1960), it was held that an affidavit based on hearsay relayed from one federal agent to another was insufficient. The affiant, an F.B.I. agent, had received his information from his superior, who in turn had received it from an F.B.I. agent in Seattle, who in turn had received it from a reliable informer. The court pointed out, therefore, that the statement in the affidavit that

the affiant obtained the information from "a source which in the past has proved reliable" was obviously false. Similarly here, the affiant, Mazaka, could not truthfully vouch for the reliability or trustworthiness of the sources of information that might have been used by the Investigators. The substantial basis for crediting the hearsay found in *Jones* is nowhere apparent in this case.

Because we are unable to determine from Mazaka's affidavit which of the statements therein are based on his own personal knowledge, which are the result of hearsay, and whether such hearsay is direct or not, we hold that the affidavit is insufficient to support the issuance of a search warrant and the search and seizure made pursuant thereto were unlawful and in violation of the constitutional rights of the defendant. See *DiBella* v. *United States*, 284 F.2d 897 (2d Cir. 1960), rev'd on procedural grounds, 369 U.S. 121 (1962). It follows that the evidence obtained as a result of such search should have been suppressed.

If hearsay evidence is to be relied upon in the preparation of an affidavit for a search warrant, the officer or attorney preparing such an affidavit should keep in mind that hearsay statements are only as credible as their source and only as strong as their corroboration. And [fol. 128] where the source of the information is in doubt and the corroboration by the affiant is unclear, the affidavit is insufficient.

Judgment will be entered vacating the judgment of the district court, setting aside the verdict, and remanding the case for a new trial consistent with this opinion.

ALDRICH, *Circuit Judge*, (concurring). This is a case of general importance. As a matter of interpretation I cannot agree with the first paragraph of Judge WOODBURY'S dissent. While I do agree with the first sentence of the second paragraph, it does not lead me to his result. The government's obligation under the Fourth Amendment to justify the issuance of a warrant is far from a pro forma matter. *Marron* v. *United States*, 1927, 275 U.S. 192, 195. This is illustrated by the undisputed rule that deficiencies in its prima facie showing are not remedied by the circumstance that subsequent events

prove it was right after all. *Byars* v. *United States*, 1927, 273 U.S. 28. I believe it would be bad practice, downgrade the government's obligation, and lead, at best, to difficult performance of their duties by United States Commissioners, if the government were permitted to cart in a barrow-load of what is hopefully pay dirt and leave it to the commissioner, or ultimately the court, to pan out a possible nugget. In this case out of three and a half printed pages only the one sentence referred to by Judge Woodbury regarding odor is affirmatively identified as being to the personal observation of a government investigator, and even he is not necessarily the affiant. I believe the initial duty should be upon the government to evidence what is reliable and why, and not to introduce a hodge-podge under some general formalistic coverall.

Such a principle is peculiarly appropriate here because [fol. 129] if a warrant is to be predicated primarily upon an odor, it is highly desirable that proper weighing may be made of the attendant circumstances. *Cf. Johnson* v. *United States*, 1948, 333 U.S. 10, 13.

WOODBURY, *Chief Judge*, (dissenting). In the light of the first and more particularly of the final paragraphs of the sheet attached to Mazaka's affidavit, quoted at length in footnote 2 of the opinion of the court, I would read the statements of fact contained therein as based upon "observations" made either by the affiant himself or by other Investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service. Since knowledge obtained from other federal law enforcement agents, though hearsay, has sufficient verification to support the issuance of a search warrant under the rule of *Jones* v. *United States*, 362 U.S. 257 (1960), see *United States* v. *McCormick*, 309 F.2d 367 (C.A. 7, 1962), *cert. den.* 372 U.S. 911 (1963), it can make no difference which specific "observations" were made by the affiant himself and which were made by other Investigators and reported in line of duty to the affiant.

But, regardless of the foregoing, the allegations of the detection of the odor of fermenting mash emanating from Ventresca's house on three occasions, twice between four

and five o'clock on the morning of August 18, 1961, and once at about four o'clock on the morning of August 30, 1961, are clear allegations of actual observations made by Investigators themselves and not observations relayed to them by someone else whose identity does not appear. These allegations read in conjunction with the others impress me as enough to warrant issuance of the search warrant by the Commissioner. See *United States* v. *Parham*, 17 F.R.D. 301 (E.D.Mich. 1955). I would affirm.

[fol. 130]

* * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JUDGMENT ENTERED—November 26, 1963.

This cause came on to be heard on consolidated appeals from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated, the verdict is set aside, and the case is remanded to that Court for a new trial consistent with the opinion filed this day.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

Approved:

/s/ PETER WOODBURY
Ch. J.

Thereafter, on December 11, 1963, mandate issued.

[fol. 131]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 132]

SUPREME COURT OF THE UNITED STATES

No. ————, October Term, 1963

UNITED STATES OF AMERICA, PETITIONER

vs.

GIACOMO VENTRESCA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—December 24, 1963

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Jan. 25th, 1964.

/s/ TOM CLARK
Associate Justice of the Supreme Court of the United States

Dated this 24th day of December, 1963.

[fol. 133]

SUPREME COURT OF THE UNITED STATES

No. 782, October Term, 1963

UNITED STATES, PETITIONER

vs.

GIACOMO VENTRESCA

ORDER ALLOWING CERTIORARI.—June 22, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 740046 108